Filed 7/28/09 P. v. Brown CA1/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. VERNON BROWN, Defendant and Appellant.	A118855 (Alameda County Super. Ct. No. 155182)

This is the tragic tale of two men, practically relatives, one of whom shot and killed the other over a $30 debt and the "attitude" with which its payment was offered. Defendant Vernon Brown shot Wakeel Shakir at least four times in the back, chest and arm with a .38 caliber revolver, killing him in front of his own home. Defendant was convicted of second degree murder (Pen. Code, § 187, subd. (a)),[1] with two strike priors (§ 1170.12), which were also alleged as serious felony priors (§ 667, subd. (a)(1)), and an enhancement for discharge of a firearm resulting in death (§ 12022.53, subd, (d)). He was sentenced to an aggregate term of 80 years to life in prison.

Defendant raises two issues on appeal: (1) that evidence of a prior non-lethal incident in which he shot a woman from behind should not have been allowed in evidence as prior misconduct relevant to intent or any other issue; and (2) that no evidence of a prior grand theft conviction (§ 487.1) should have been put before the jury in the bifurcated trial on the priors, since the district attorney had announced his decision

[1] All statutory references are to the Penal Code unless otherwise specified.

not to go forward on the enhancement allegation relating to that prior conviction. We affirm.

FACTUAL BACKGROUND

Much of the following summary of facts is taken from the defendant's own taped statements to the police, which were admitted in evidence at his trial. Defendant's wife, Sharon, was the cousin of Tamera Watson,[2] who lived with her fiancé, Shakir, the victim in this case, on 84th Avenue in Oakland. At approximately 9:00 a.m. on the morning of August 29, 2006, defendant installed a cable for a television set at the home of Tamera and Shakir, for which he had been promised $30 when Shakir got home from work. At about 5:00 p.m., Shakir drove to defendant's house to give him the money, but he was not very gracious about it. He did not thank defendant, and instead held the money out of his car window saying, "I ain't got time for this. Come get the money." Defendant said, "What's with the attitude?" Shakir responded, "I need to go home and take a bath. I ain't got no time to talk."

Defendant was offended and refused to accept the money. He told Shakir to "shove it up [his] ass" and that he did not "appreciate the attitude." Shakir drove off without paying the $30.

When Sharon arrived home from work at about 8:00 p.m., she recounted a telephone conversation she'd had with Tamera in which Tamera reportedly told Sharon that Shakir was not like defendant, that he would not shoot a gun up in the air if a prowler were at his house.[3] This was evidently a reference to an incident two years earlier when defendant had fired a warning shot into the air to scare off a prowler near his house, rather than shooting to hit the man. Defendant interpreted Tamera's remark as accusing

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[2] Tamera was referred to by various last names, including Watson, Davis, Shakir, and Watson-Shakir. To avoid confusion, we will call her "Tamera."

[3] When Tamera was questioned by the police about the telephone conversation with Sharon she gave a different version of it, but there was no testimony regarding her version.

him of lacking the courage to actually shoot someone, whereas Shakir would have had more courage. Defendant also claimed he thought the remark was a "threat" that he should beware of Shakir, since he was willing to shoot someone.

Defendant was upset by Tamera's remark. He called her to talk about it, but she brushed him off and hung up the phone, which further increased his anger.

At about 10:00 p.m., defendant decided to go to Shakir's house to talk to him about Tamera's comment and to confront him about his "attitude" earlier in the evening. Defendant took a loaded .38 caliber revolver with him, putting it in his back pants pocket. He later told the police that he took the gun with him for "protection" in case Shakir had a gun, or in case the situation "got heated." Sharon tried to restrain defendant from leaving the house, but he pulled away and drove to Tamera and Shakir's house.

After parking his truck across the street from their house, defendant knocked on their door and Shakir answered. Tamera was not home. Defendant told Shakir about Tamera's remark and also told him again that he did not appreciate Shakir's attitude when he had come to defendant's house earlier. Shakir said, "You know what? I ain't fucking with you, Vern." He then said, "I'm going to give you what I owe you." Shakir then walked past defendant and headed toward his car, which was parked in the driveway about ten to fifteen feet from the door. (Defendant later told the police that he did not understand why Shakir was going to his car, since he assumed Shakir kept his money in the house.)

Defendant said he "felt threatened" because he feared Shakir might be going to get a weapon from his car. As Shakir moved past him, defendant took the gun from his pocket without Shakir seeing it. After Shakir descended the front steps and had gone about halfway across the lawn, when he was at a distance defendant estimated at five to six feet away, defendant shot him in the back near his right shoulder without warning. Defendant admitted he was angry when he fired the first shot.

At that point, Shakir turned and attempted to flee toward a mobile home parked in front of the house. Defendant then fired three more shots at Shakir in rapid succession

because, in his words, he was "angry" and "out of control."[4] Shakir collapsed to the sidewalk, gasping for air. A neighbor heard him say, "I'm shot. I'm shot."

Tamera's 19-year-old son, Ronald Trigg, who was in the house watching TV, heard some arguing and gunshots but did not realize that Shakir was involved. Tamera then telephoned, asking for Shakir, and Trigg started looking for him, eventually finding Shakir lying on his stomach on the sidewalk. Trigg called 911, but Shakir died on the sidewalk in front of his home, with his car keys lying next to him.

Defendant told the police that Shakir had nothing in his hands when he answered the door and made no movements suggesting that he was reaching for a weapon. An evidence technician searched Shakir's car that night and found no weapons inside. A district attorney's investigator searched it again several months later and found $33 clipped to the sun visor.

After the shooting, as defendant headed back to his truck, Sharon drove up. Defendant pounded on the window of her car and told her what he had done. She drove off toward their home on 65th Avenue, and the defendant followed in his truck. Upon arriving home, defendant told his stepson and a neighbor what he had done, then shouted at his wife to give him some money. She did not comply, but his stepson gave him $20. Defendant then took off for his brother's house in Sacramento, stopping along the frontage road in Berkeley where he threw his gun into the bay.

Defendant's brother advised him to turn himself in to the police and brought him back to Oakland in the early morning hours of August 30th, where he surrendered. Defendant gave two statements to the police in which he related the foregoing events, admitting that he intended to hit Shakir when he fired the weapon at him and that he fired at his upper torso because he was "obviously seeking to do bodily injury" and "possibly"

[4] A forensic pathologist testified that there were five gunshot wounds: two to the back, one to the right chest, one through the left arm, and one near the left armpit. He could not tell whether four or five bullets were actually involved, as the bullet that entered and passed through the left arm could also have penetrated the left chest area near the armpit. There were five bullets in defendant's gun.

trying to kill him. Defendant said, "[O]nce I started . . . it was my intention to finish. You know, . . . that's mean. It's not right–it was my intention to finish." He admitted he was upset before he left his house, that he was prepared to use his gun if things got "heated," and that he "lost control" even before he fired the first shot.

Defendant told the police he had known Shakir for about eight months, as long as Tamera had been dating him, and had never had a problem with him before. However, he said that Shakir presented himself as a "tough guy" who "knows how to defend himself." And he had heard Shakir say he had a gun. The only incident in which defendant was aware of Shakir's having acted violently was when he got into a fist fight with a friend who had commented on Tamera's "behind," saying, "You better not turn your back, because I'm going to take your woman." Defendant was also aware that Shakir had been to prison before, but they had never discussed the details.

In addition to testimony concerning the shooting of Shakir, there was testimony about an earlier incident in which defendant shot a woman from behind. Janice Norris-Torrez was the personnel coordinator at Oliver Rubber Company in Emeryville in October 1994, where the defendant was employed at that time. Defendant had recently been off work for a work-related injury and was drawing workers' compensation. On October 19, 1994, he came to the office where Norris-Torrez was working, upset that his benefits had been terminated. Norris-Torrez told him they had been terminated because he had failed to keep his medical appointments. Defendant became upset, blaming Norris-Torrez for the termination of his workers' compensation.

Norris-Torrez left to go to a previously scheduled meeting, which lasted about an hour. When she returned, defendant was still in the office. Norris-Torrez told him she could do nothing further to help him and left the office to work in another of the company's buildings. As she walked down the street, she heard Greg Stewart, defendant's supervisor, say, "Vernon, don't do it." Stewart had seen Norris-Torrez walking down the street with the defendant following. When defendant caught up with Norris-Torrez he shot her in the buttocks with a .25 caliber Beretta. He then hurried away.

Defendant told the police investigating the murder of Shakir that he did not intend to kill Norris-Torrez. The parties stipulated that defendant was convicted of violating section 245, subdivision (a)(2), as a result of shooting Norris-Torrez, and that he was sentenced to nine years in prison for the incident.

Defense counsel presented no evidence except a diagram of the crime scene, which showed that the driveway was only five and one-half feet from the front steps. From this she argued that if Shakir was going for a gun, defendant's hasty reaction was not unreasonable. She argued that defendant took a gun with him "to protect himself" and felt threatened when Shakir said, "I'm going to give you what I owe you." She told the jury that defendant was acting out of fear when he shot Shakir. She thus invoked theories of actual or imperfect self-defense and argued at least that his crime was not first degree murder.

The jury was instructed on first and second degree murder, voluntary manslaughter, involuntary manslaughter, self-defense and imperfect self-defense. As noted, the jury convicted the defendant of second degree murder.

In a bifurcated trial to the same jury, the prosecution presented documentary evidence that defendant had been convicted of the prior 1994 firearm assault on March 28, 1995 (§ 245, subd. (a)(2)) based on his guilty plea and admission of personal use of a firearm (§ 12022.5). Documentary evidence also showed defendant was convicted of grand theft by plea on August 27, 1987 (§ 487.1), and robbery by plea on November 5, 1985 (§ 211). A fingerprint expert testified that the fingerprints in the section 969b packet relating to the prior grand theft and robbery convictions matched defendant's prints. The trial court instructed the jury that defendant was the same person referred to in the prior conviction records. The jury found all three prior conviction allegations to be true.

DISCUSSION

I. The Trial Court Properly Admitted Evidence of Defendant's Prior 1994 Assault

Defendant claims that the court erred in allowing the evidence concerning his conviction for the 1994 shooting of Norris-Torrez and the facts underlying that conviction. This, he contends, was propensity evidence, the admission of which violated Evidence Code section 1101. We review the admission of the evidence for abuse of discretion, both with respect to the determination of its relevance and the weighing of probative value against prejudicial effect. (*People v. Carter* (2005) 36 Cal.4th 1114, 1147, 1149.)

A. The Trial Court's Ruling on Admissibility of the 1994 Assault

Admissibility was determined through an in limine motion by the district attorney seeking to introduce the evidence under Evidence Code section 1101, subdivision (b) ("1101(b)"). He argued that the evidence was admissible to show absence of mistake or accident, as well as intent.

Defense counsel claimed evidence of the prior assault should not be admitted because defendant told the police he did not intend to kill Norris-Torrez, whereas in the present killing he was more equivocal, saying, "Well, to cause bodily injury to him. Now, as far as kill, I didn't know if he would die or not–that's why I asked you guys when you came into the room—did he die?" She argued that if defendant had intended to kill in 1994, the evidence would be admissible under Evidence Code section 1101(b) because the intent in the prior offense would be the same as that the prosecution sought to prove in the current charge. However, she argued, if it were also admitted where defendant disclaimed intent to kill in 1994, then the exception allowing admission of similar prior crimes to prove intent "ends up swallowing the rule" prohibiting prior misconduct evidence. Defense counsel also argued that the evidence was excessively prejudicial.

In a thoughtful and conscientious ruling, the trial court admitted the evidence, ruling it was relevant to intent, or more broadly "state of mind," which the court interpreted as encompassing absence of mistake or accident because those issues are simply "another way of looking at intent or state of mind."[5] The court specifically noted that the prosecution bore the burden of ruling out "self-defense or perceived self-defense" and considered the 1994 assault probative on that point, as well. Overall, the court found the "probative value here is great to prove the state of mind of the defendant in that respect, his intent."

The court specifically recognized that different degrees of similarity between the prior misconduct and the current crime are required, depending upon which issue the evidence is admitted to prove, and noted that where the issue is intent a lesser degree of similarity is required than where it is identity or common plan or scheme.

The court then enumerated the similarities between the prior assault and the killing of Shakir, including that in each instance defendant engaged in verbal altercation with the victim or someone closely associated with the victim, and the assault took place while defendant was angry. In each case, he had armed himself before coming to the scene of the crime, where he engaged in further dispute with the victim. In each instance, he did not "directly confront the victim face to face," but rather waited until the victim's "back [was] turned," and then shot the victim in the back.[6] And in each case, he then fled the scene and discarded the weapon. The court further credited other similarities cited by the district attorney, including that defendant was acquainted with both victims prior to the

[5] This broad definition of intent is reflected in the court's modification to standard CALJIC No. 3.31, in which it substituted the words "specific intent or mental state" for the standard words "specific intent" when telling the jury that it must find a union of act and intent.

[6] The trial court also acknowledged that the wound in 1994 was in the buttocks, whereas the killing of Shakir involved four shots to the back and side of the torso, but he thought the physical location was sufficiently similar to make both attacks equivalent.

attacks, that he had concealed the firearm on his person prior to both attacks, and that he was just a few feet from each victim when he shot them.

The trial court went on to consider the prejudicial effect of the evidence. It noted that the evidence of the two crimes came from different sources at different times; that defendant had been convicted of, and punished for, the prior assault (thereby reducing the likelihood that the jury would convict him of the current offense to punish him for his past conduct); and that the prior offense was no more inflammatory—and arguably less inflammatory—than the charged offense. Though the prior offense occurred 12 years prior to the charged offense, its remoteness was not so great as to require exclusion of the evidence. In sum, the court found the "probative value substantially outweighs the prejudicial effect."

B. Analysis

Defendant claims that the court erred in admitting the evidence because the firearm assault on Norris-Torrez was a general intent crime, whereas the current charge involved intent to kill and premeditation for first degree murder. He argues that, since he expressly disclaimed any intent to kill Norris-Torrez, the prior assault was not relevant to proving intent in the murder charge involving Shakir. We are not persuaded.

Ordinarily, evidence of prior misconduct is inadmissible to prove a defendant's conduct on a specific occasion or to prove his predisposition to commit a crime. (Evid. Code, § 1101, subd. (a).) The reason for excluding such evidence is not that it is irrelevant. Rather, the danger is that it has a tendency to bear too heavily on the jury's assessment of the defendant's guilt. "It may almost be said that it is because of the indubitable relevancy of specific bad acts showing the character of the accused that such evidence is excluded. It is objectionable not because it has no appreciable probative value but because it has too much." (1A Wigmore, Evidence (Tillers rev. 1983) § 58.2, p. 1212.) Indeed, the Supreme Court has recognized this principle, noting that such evidence is excluded not because it is irrelevant, but for extrinsic policy reasons,

including prejudice to the defendant and jury confusion and distraction. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 21.)

But there is an exception to the rule if the prior act is relevant to prove a disputed issue other than propensity, "such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident." (Evid. Code, § 1101(b).) This is not an exhaustive list of issues, but is "merely illustrative of the types of relevant facts in proof of which other crimes may be shown as circumstantial evidence. [Citation.]." (1 Witkin, Cal. Evidence (4th ed. 2000) Circumstantial Evidence, § 75, p. 411.) To be relevant, an uncharged offense must tend " ' "logically, naturally, and by reasonable inference" ' " to prove the issues on which it is offered. (*People v. Carter, supra*, 36 Cal.4th at p. 1166; *People v. Robbins* (1988) 45 Cal.3d 867, 879.)

Other crimes evidence is admissible " 'where the proof of defendant's intent is ambiguous, as when he admits the acts and denies the necessary intent because of mistake or accident.' " (*People v. Robbins, supra*, 45 Cal.3d at p. 879, quoting *People v. Kelley* (1967) 66 Cal.2d 232, 242-243.) A defendant's not guilty plea puts in issue all elements of the offense, and the prosecution is "entitled to prove its case and especially to prove a fact so central to the basic question of guilt as intent. [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1243-1244.) The prosecution also had the burden to negate self-defense (*People v. Pineiro* (1982) 129 Cal.App.3d 915, 920; *People v. Banks* (1976) 67 Cal.App.3d 379, 383-384), or imperfect self-defense (*People v. Rios* (2000) 23 Cal.4th 450, 462; *In re Walker* (2007) 147 Cal.App.4th 533, 552).

Here, intent—or mental state—was the only truly contested issue. The crime charged was murder, not just "premeditated first degree murder," as defendant states in his brief—so the intent the prosecutor sought to prove was either a premeditated, deliberate intent to kill, or the doing of an intentional act with conscious disregard of a known danger to human life. Because of the range of mental states subject to proof under a murder charge and its lesser included offenses, especially when a claim of actual or

imperfect self-defense is raised, the trial court did not abuse its discretion in finding the prior assault relevant to a broadly defined "intent" or "state of mind"—an approach, not incidentally, endorsed by the Supreme Court. (See *People v. Whisenhunt* (2008) 44 Cal.4th 174, 203-204 [" 'intent' " and " 'absence of accident' " are "two ways of describing the same relevant issue"]; *People v. Steele*, *supra*, 27 Cal.4th at p. 1243 [holding prior acts relevant to "mental state"].) But even examining the issues individually, the evidence was relevant and admissible.

With respect to proof of intent, the Supreme Court has long recognized " 'that if a person acts similarly in similar situations, he probably harbors the same intent in each instance' [citations], and that such prior conduct may be relevant circumstantial evidence of the actor's most recent intent. The inference to be drawn is not that the actor is *disposed* to commit such acts; instead, the inference to be drawn is that, in light of the first event, the actor, at the time of the second event, must have had the intent attributed to him by the prosecution." (*People v. Robbins*, *supra*, 45 Cal.3d at p. 879.) This reasoning is based on " 'the doctrine of chances–the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all. . . .' " (*Ibid.*, quoting 2 Wigmore, Evidence (Chadbourn rev. 1979) § 302, p. 241.) As one court put it: "The man who wins the lottery once is envied; the one who wins it twice is investigated." (*U.S. v. York* (7th Cir. 1991) 933 F.2d 1343, 1350.)

No " 'categorical statement' " can be made whether a single event of uncharged misconduct is sufficient to justify admission on the issue of intent under the " 'chances' " theory; " '[a] simple, unremarkable single instance of prior conduct probably will not qualify, but a complex act requiring several steps, particularly premeditated, may well qualify. . . .' [Citation.]" (*People v. Robbins*, *supra*, 45 Cal.3d at pp. 880-881, fn. 5.) Nevertheless, "the doctrine of chances teaches that the more often one does something,

the more likely that something was intended, and even premeditated, rather than accidental or spontaneous." (*People v. Steele*, *supra*, 27 Cal.4th at p. 1244.)

In this case the trial court articulated numerous similarities between the two crimes which were sufficient to render the prior assault admissible on the issue of defendant's intent or state of mind. There was evidence of planning in both crimes (by bringing a gun to confront a perceived enemy, concealing it from view, and waiting until the victim's back was turned to open fire). Both shootings occurred at close range. In both cases, defendant fled after the shooting, tending to show consciousness of guilt. And in both cases he discarded the gun.

Nevertheless, defendant focuses on the difference between the general intent required for assault and the specific intent required for murder to argue that the prior assault was irrelevant to the jury's determination of his mental state, and he relies primarily on *People v. Cole* (2004) 33 Cal.4th 1158. There, the question was whether the trial court erred in admitting evidence of two prior misdemeanor convictions for cohabitant abuse involving the same victim when the defendant was on trial for the torture murder of that victim. (*Id.* at pp. 1193-1194.) Defendant argued that the evidence of the prior convictions should have been excluded because the prior instances of cohabitant abuse, which involved slapping and attempting to choke the victim, were not sufficiently similar to the current charges—where defendant was accused of dousing the victim with gasoline and setting her on fire—to be admissible under Evidence Code section 1101(b) on the issue of intent. (*Id.* at pp. 1172-1174, 1194.)

The Supreme Court noted that intent to torture, an element of the charged offenses, requires intent to inflict " 'extreme pain,' " " 'extreme and prolonged pain,' " or " ' "cruel pain and suffering for the purpose of revenge, extortion, persuasion or for any other sadistic purpose." ' " (*People v. Cole*, *supra*, 33 Cal.4th at p. 1194.) The misdemeanor domestic violence priors, on the other hand, were general intent crimes involving willful infliction of a physical injury on a cohabitant resulting in traumatic

injury. (CALCRIM No. 840.) The evidence summarized in the court's opinion provides little detail about the prior offenses, beyond that the victim received a black eye and choke marks around her neck on one occasion and a bruise below the knee on the other. (*People v. Cole*, *supra*, 33 Cal.4th at pp. 1193-1194.)

It does appear that the prior offenses in *Cole* were significantly different from the intentional torching of the victim in the current case, and that the willing infliction of relatively minor injuries during a domestic dispute would have little bearing on the intent to pour gasoline over a sleeping woman and light her on fire. Still, the Supreme Court did not hold that the evidence of prior cohabitant abuse was improperly admitted, but merely assumed it was for the sake of argument. (*People v. Cole*, *supra*, 33 Cal.4th at p. 1195.) Nevertheless, it held the evidence was not prejudicial. In sum, *Cole* is not only unpersuasive because there was no holding of evidentiary error, but it is also distinguishable in that the prior offenses were more dissimilar to the charged offense than is true in this case.

It is true that in most cases the relevance of prior misconduct is to show that the defendant " ' "probably harbor[ed] the same intent in each instance." ' " (*People v. Carter*, *supra*, 36 Cal.4th at p. 1149; *People v. Robbins*, *supra*, 45 Cal.3d at p. 879.) Indeed, defendant's argument hinges on the notion that the intent in both cases must have been identical in order for the prior offense to be relevant to his intent in shooting Shakir.

Even assuming the intent in both instances must be "the same," the trial court did not abuse its discretion in admitting evidence of the 1994 assault. The analysis need not be restricted to the technical elements of the prior and current crimes. It is not the prior conviction itself that is made admissible under Evidence Code section 1101(b), but rather evidence that the defendant "committed a crime, civil wrong, or other act" bearing on his intent in the present case. The underlying facts of the prior assault were therefore admissible, and the jury was not confined to considering—and was not instructed upon—the elements of the prior conviction or the general intent necessary for assault.

Given the facts of the prior offense, a rational inference arises that defendant harbored the intent to inflict bodily injury upon Norris-Torrez, even though such intent was not an element of his prior conviction. In other words, the jury would have been fully justified in finding the defendant's intent went far beyond the desire to "scare" her, as the district attorney argued. The prosecutor urged the jury to find that the intent in the present case included a premeditated and deliberate intent to kill. But even an intent to inflict bodily harm, while not required for second degree murder, would support the second degree murder conviction if the jury found that the defendant's shooting at Shakir in the upper back area was by its nature dangerous to human life and that the defendant knew of that danger but acted with conscious disregard for human life. (CALJIC No. 8.31.) Therefore, the actual intent (as opposed to the legally required intent) in both cases could have been the same, depending upon which theory of criminal liability was under consideration.[7]

But we believe the evidence was admissible even if the defendant's intent in the prior assault was not "the same" as his intent in killing Shakir. (*People v. Steele*, *supra*, 27 Cal.4th at pp. 1244-1245 [fact that prior second degree murder was not premeditated did not destroy its probative value in proving premeditation]; cf. *People v. Garelick* (2008) 161 Cal.App.4th 1107, 1115-1116 [proof of same specific intent in connection with child pornography found on defendant's computer was not necessary for admissibility on issue of intent, even though current charge required specific intent].) Even in cases where identity is the issue upon which a prior bad act is introduced, "the charged and uncharged crimes need not be mirror images of each other." (*People v.*

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[7] The Attorney General argues that the jury could have concluded that the defendant, in fact, harbored the intent to kill Norris-Torrez in 1994. We find this theory implausible, especially given the district attorney's argument to the contrary. However, as discussed in the text, we do not find that the intent involved in both incidents need be identical in order for the prior offense to be relevant to intent in the current case.

Carter, *supra*, 36 Cal.4th at p. 1148), and even less similarity is required when the prior misconduct is admitted to prove intent (*id.* at p. 1149).

While the two crimes in this case do bear striking similarities, there is also a crucial difference which is equally relevant to the defendant's intent in shooting Shakir. This difference was the part of the body at which the defendant aimed in the two different incidents. The district attorney made this theory of relevance explicit in his opening statement: "So clearly in 1994, he had intent to shoot, but you'll hear in his own mouth [*sic*] that when he shot Janice Norris[-Torrez], he wasn't trying to kill her. He shot her in the buttocks on purpose. On purpose. He wasn't trying to kill her. He was trying to scare her, intimidate her. Again, he was upset. Again he was unreasonable. [¶] But we fast forward to August of 2006 and you consider that 1994 event, again, for the purposes of intent or the absence of mistake or accident. Mr. Shakir's murder was not a mistake. It was not an accident. And the reason you'll know this is you'll hear from Mr. Brown's own words in his taped statement that he shot Mr. Shakir in the upper back on purpose. He's asked why, and he says, ['W]ell, I know there are vital organs there.['] And the Sergeant says, ['W]ell, what kind of vital organs? What do you mean?['] This is in the second statement, and he says, [']Lungs, heart.['] This is not like the 1994 incident to the extent he was trying to scare Mr. Wakeel Shakir. He was trying to kill him. And he did it."

Thus, when defendant had no intent to kill, he aimed at Norris-Torrez's buttocks, a part of the body whose injury is unlikely to result in death. In the present case, he aimed for Shakir's upper torso, where he knew "vital organs" were located, telling the police he was "obviously seeking to do bodily injury." This distinctive difference in two otherwise similar crimes tends to support an inference that defendant's intent in 2006 was to do more serious bodily injury to Shakir, perhaps kill him.

Defendant told the police that he had aimed at Norris-Torrez in such a way as to inflict a non-lethal injury: "I put the gun on her butt; I wasn't trying to kill her." Since he

had previously shot someone in a manner that demonstrated he knew how to inflict a non-fatal gunshot wound, the fact that he shot Shakir in a more vulnerable spot raises an inference that he either intended to kill Shakir or acted in conscious disregard of that possibility. Defendant also was so close to the victims in each case that it may be inferred that the difference in entry points of the bullets was not due to poor aim or mistake. As he put it, "it's easy to point and shoot especially at a close range." Based on this analysis, too, we believe the trial court was well within its discretion in admitting evidence of the prior 1994 assault.

As noted earlier, the trial court used the word "intent" not only to apply to the specific intent to kill, but rather to defendant's overall state of mind, including absence of mistake or accident. The prosecutor also told the jury in his opening statement that the evidence was probative on these issues, as well as showing defendant's intent in shooting Shakir. Still, defendant claims the issue of mistake was not before the jury, given the fact that there were no jury instructions on mistake of fact as a defense to a specific intent crime, and the instruction on evidence of prior crimes specifically limited consideration of such evidence to the defendant's intent.

However, mistake, not as a separate legal defense but in its more common usage, was inherently part of the claim of imperfect self-defense, which involves a subjective but unreasonable belief in the need for self-defense. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) If a defendant's belief is unreasonable, it is at the very least mistaken. Therefore, whether regarded as admissible on intent, absence of mistake, or imperfect self-defense, there was no error in the admission of the evidence.

The defense also requested and received jury instructions on actual self-defense, and the prosecution therefore was properly allowed to introduce evidence of prior assaultive conduct which tended to undermine that defense. The trial court specifically considered the prior assault probative with respect to the issues of self-defense or "perceived self-defense." This, too, was correct. Evidence of a prior assault may be

admitted to negate a claim of self-defense. (*People v. Demetrulias*, *supra*, 39 Cal.4th at pp. 9, 15 [evidence of knife assault on another elderly man and robbery of his home properly admitted to show that stabbing death of elderly man close to the same time was not in self-defense]; *People v. Terry* (1970) 2 Cal.3d 362, 396 ["proof of involvement in prior crimes is admissible . . . to rebut a defense that a criminal act was done out of 'honest fear' "]; *People v. Wells* (1949) 33 Cal.2d 330, 341-343 [prisoner's prior assault on guard admitted to rule out self-defense in subsequent assault on guard]; *People v. Simon* (1986) 184 Cal.App.3d 125, 129-130 [prior assault on man found in defendant's girlfriend's apartment held admissible to negate self-defense in defendant's trial for killing a man found in his girlfriend's apartment if the jury found the motive in both cases was jealousy].)

Defendant claims a prior assault would be relevant only if he had claimed self-defense or imperfect self-defense in the incident with Norris-Torrez. The foregoing cases prove otherwise, as there was no claim of self-defense in the prior crimes held admissible in *Wells*, *supra*, 33 Cal.2d 330, *Terry*, *supra*, 2 Cal.3d 362, or *Simon, supra,* 184 Cal.App.3d 125. Indeed, self-defense is one of the issues on which prior misconduct evidence is cited as being probative under the doctrine of chances in 2 Wigmore, Evidence, *supra*, § 302, p. 241.

People v. Sam (1969) 71 Cal.2d 194, cited by the defendant, involved an incident in which the defendant, while intoxicated, kicked a man in the stomach who had bragged about knowing karate, saying he believed the man was about to attack him. (*Id.* at pp. 199, 201.) The man died two weeks later, and defendant claimed self-defense against a murder charge. (*Id.* at p. 201.) The prosecution introduced evidence of two prior incidents in which the defendant had kicked a former mistress and, along with a group of other men, had knocked down and kicked a long-time friend. (*Id.* at pp. 200-201.) The theory of relevancy advocated at trial was common plan or scheme, as well as identity. (*Id.* at p. 204.)

The Supreme Court rejected those theories, but considered a theory of relevancy newly urged on appeal, that the evidence was relevant to establishing intent and negating self-defense. (*People v. Sam, supra,* 71 Cal.2d at pp. 205-206.) The court was reluctant to endorse such a theory, where the man whom the defendant killed was a stranger, whereas the two prior incidents involved kicking his mistress during a drunken quarrel and kicking a friend during a drunken brawl. (*Id.* at p. 205.) Because there was nothing distinctive about his method, and only superficial similarity in the prior incidents, the court considered the relevance of the evidence "tenuous at best," but allowed the prosecution an opportunity to advance the theory on retrial. (*Id.* at pp. 206-207.)

The evidence here was considerably more probative than that in *People v. Sam, supra,* 71 Cal.2d 194. The method of attack showed more planning in that defendant brought a concealed weapon in each case to confront a perceived adversary. The shooting in each case occurred after the defendant had spent some time brooding over an imagined grievance with a friend or work associate. In each case, the defendant waited until the victim's back was turned before he shot, and he shot without warning in close proximity to the victim. And in each case he fled after the attack. These aspects of similarity make the evidence more probative of intent and lack of self-defense than was the evidence in *Sam*. The fact that defendant engaged in a previous unprovoked sneak attack from the rear on an adversary tends to render less credible his claim of self-defense in the present case. Given the similarities in the execution of the prior assault, it could rationally be inferred that defendant was motivated by the desire for revenge in each case, not by fear. The trial court did not abuse its discretion in admitting this evidence under Evidence Code section 1101(b).

Finally, defendant argues that because the jury was instructed that the evidence of the 1994 incident was relevant only to prove "the existence of the intent which is a necessary element of the crime charged," the prosecution has waived any argument that evidence of the prior assault was admissible on any other issue, such as absence of

mistake or self-defense. In claimed support defendant cites *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 640, which held the prosecution had waived a theory of inevitable discovery in response to defendant's suppression motion (§ 1538.5), where such a theory had not been asserted in the trial court. That is a far different situation from the one here, where defendant suggests the prosecution has "waived" a theory for admissibility of evidence based on its failure to request a jury instruction on that theory. A party cannot "waive" the relevance of evidence. If the district attorney was entitled to instruction on a more broadly defined class of issues for which the 1994 assault was admissible, then defendant already reaped at trial the benefit of the prosecutor's neglect to seek a more comprehensive instruction.

There remains the question whether the probative value of the evidence outweighed its prejudicial effect, which is part of the analysis that must be performed under Evidence Code section 1101(b).[8] Evidence of other crimes is always prejudicial to some extent. However, as noted above, the probative value of the evidence was strong on the primary issue in dispute, namely defendant's state of mind in shooting Shakir. The evidence of the prior assault came from independent sources, which reduced the danger of fabrication. (See *People v. Ewoldt, supra,* 7 Cal.4th at pp. 404-405.) In addition, defendant was convicted of the prior offense, and the jury was so informed. This reduced the likelihood that the jury would convict the defendant of the current offense to punish him for past misdeeds. (*Id.* at p. 405.) It also lessened the risk of jury confusion as to whether it needed to decide the defendant's criminal liability with respect to the prior assault, as the prior conviction conclusively determined his guilt. (*People v. Balcom* (1994) 7 Cal.4th 414, 427.) There was no undue consumption of time in presenting

[8] The Attorney General argues that appellant failed to raise an issue under Evidence Code section 352 as to the evidence being more prejudicial than probative. We find it unnecessary to address this issue, as the same analysis is required under Evidence Code section 1101(b) (*People v. Ewoldt* (1994) 7 Cal.4th 330, 404), and defendant did argue that the evidence was prejudicial.

evidence of the prior assault: the testimony of Norris-Torrez and Stewart took a total of only 18 minutes.

"Remoteness" or "staleness" of prior conduct is a factor potentially cautioning against admissibility under Evidence Code section 1101(b). (See *People v. Harris* (1998) 60 Cal.App.4th 727, 739; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1395.) Defendant's prior crime occurred 12 years earlier, but this was no longer than the time elapsed between the prior misconduct and the charged offense in *People v. Ewoldt, supra*, 7 Cal.4th at p. 405 and the cases there discussed. Acts remote in time are not automatically inadmissible, and even a prior act from 20 years earlier or more is not necessarily "too remote." (*People v. Waples, supra*, 79 Cal.App.4th at p. 1395 [prior acts occurred 18-25 years earlier].) "No specific time limits have been established for determining when an uncharged offense is so remote as to be inadmissible. [Citation.]" (*People v. Branch* (2001) 91 Cal.App.4th 274, 284 [30-year time lapse].) Moreover, "significant similarities between the prior and the charged offenses may 'balance[] out the remoteness.' [Citation.]" (*Id*. at p. 285.) The fact that defendant was sentenced to nine years in prison as a result of the prior offense, and hence had spent much of the intervening time in custody, also diminishes the weight to be ascribed to its remoteness. (See *People v. Burns* (1987) 189 Cal.App.3d 734, 738.)

Perhaps most significantly, we view the evidence of the 1994 assault as considerably less inflammatory than that relating to the shooting of Shakir. Not only did Norris-Torrez survive, but she was shot only once in the buttocks, rather than four times in the back. In light of these factors, the trial court did not abuse its discretion in finding that the probative value of the evidence outweighed its prejudicial effect.

Finally, even if we were to conclude that the evidence was improperly admitted, we could not agree that its admission was prejudicial. Claims of evidentiary error are reviewed under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Samuels* (2005) 36 Cal.4th 96, 114.) For the first time on appeal, the defendant claims

the admission of the prior assault also violated his federal due process rights. " '[G]enerally, violations of state evidentiary rules do not rise to the level of federal constitutional error.' [Citation.]" (*People v. Samuels*, *supra*, 36 Cal.4th at p. 114.) However, even assuming the issue had been properly preserved and the more rigorous federal standard of review were applied, we would find the error harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

After simmering for several hours over a perceived insult, defendant brought a loaded, concealed firearm to the victim's home to confront him. He kept the weapon concealed until the victim's back was turned. He then shot an unarmed man in the back four times without warning, including while the victim was trying to escape to the safety of a nearby mobile home. No reasonable provocation was shown on the part of the victim.

On this record, we find it inconceivable that the jury would have found that defendant acted in actual self-defense. Such a defense would be precluded by the defendant's continued attack after Shakir was effectively disabled and any danger of aggression on his part had passed (*People v. Gleghorn* (1987) 193 Cal.App.3d 196, 202; CALJIC Nos. 5.52, 5.53), as was evidenced by the defendant's firing three shots at Shakir even as he was retreating toward the mobile home.

We also believe beyond a reasonable doubt that the jury would have rejected a theory of imperfect self-defense, even in the absence of evidence of the prior assault. Defendant admitted to the police that he fired the last three shots because he was "angry" and "out of control." He also responded affirmatively that Shakir was "attempt[ing] to flee" when he fired the last three shots. These admissions negate the notion that he was acting out of subjective fear at that point in time.

II. Admission of Record of Prior Grand Theft Conviction

A. Background

The information alleged that defendant previously had been convicted of four felonies: (1) the 1994 firearm assault discussed above (§ 245, subd. (a)(2)); (2) a 1987 grand theft (§ 487.1); (3) a 1985 robbery (§ 211); and (4) a 1982 second degree burglary (§ 459). The first and third priors were alleged to be strike priors (§§ 667, subd. (e)(2), 1170.12, subd. (c)(2)), as well as five-year serious felony priors (§ 667, subd. (a)), and one-year prison priors (§ 667.5, subd. (b)). The second prior conviction for grand theft was alleged only as a one-year prison prior. (§ 667.5, subd. (b).) There was no enhancement alleged with respect to the fourth prior conviction.

While the parties awaited the jury's verdict, the court discussed with counsel the prior conviction allegations, in the event the jury's verdict required a trial on those allegations. The district attorney dismissed the fourth prior conviction, as to which no enhancement was alleged. The court then noted that prior prison term enhancements had been alleged with respect to the first three priors (§ 667.5, subd. (b)), and asked the district attorney if he intended to "go forward" on those allegations, seeking to clarify how much of the prior conviction allegations would be read to the jury. The district attorney responded, "Your Honor, regarding the 667.5(b) clause, it is not my intention to go forward on those clauses." The court concluded that the jury would hear only the allegations of which offenses had been committed, without reference to the prison prior allegations.[9]

[9] The allegation of each prior conviction that was read to the jury included the phrase that the defendant had "received a prison term therefor," but did not otherwise mention the elements of a prior prison term enhancement. The charge to the jury did not require a finding on the prison term allegation, and the verdict forms did not reflect such language. (See generally, CALCRIM No. 3100, Commentary, pp. 847-849.)

B. Analysis

Defendant interprets the foregoing discussion as a dismissal of all allegations under section 667.5 with respect to the three remaining prior convictions. He reasons that, since the second alleged prior for grand theft (§ 487.1) was alleged only as a one-year prison prior, no evidence of the 1987 grand theft should have been put before the jury. He claims it was both irrelevant and was prohibited character evidence, and therefore violated his federal right to due process.

The Attorney General argues that the district attorney's statement was ambiguous, that he had no independent power to dismiss the prior conviction allegation (§ 1386), and that the prior grand theft conviction may have been included in the information for purposes of establishing ineligibility for probation, and not simply as a one-year prison prior enhancement. The Attorney General assumes, however, for purposes of argument that "after the prosecutor decided not to go forward on any of the section 667.5 allegations (and by implication, not to go forward on the second alleged prior), there was no longer basis for the court to submit to the jury the question whether the second alleged prior was true . . . ." Nevertheless, he claims that any error was waived by defense counsel's failure to object when exhibits proving the second prior conviction were offered in evidence or at any other time throughout the trial on the prior conviction allegations.

Ordinarily, failure to object to the admission of evidence constitutes a waiver of that issue on appeal. (Evid. Code, § 353; *People v. Samuels, supra*, 36 Cal.4th at p. 113.) Defendant acknowledges that there was no defense objection but claims his attorney provided ineffective assistance of counsel in failing to object. (*Strickland v. Washington* (1984) 466 U.S. 668.) He raises this issue on appeal, asserting there was no conceivable tactical basis for counsel's failure to object. (*People v. Nation* (1980) 26 Cal.3d 169, 179.) Although the Attorney General essentially concedes that the evidence should not have been admitted, he suggests that the district attorney might have proceeded with

proof of the second prior conviction for "some other legal purpose" besides the enhancement originally alleged under section 667.5, subdivision (b), though the only other purpose he specifies is probation ineligibility.

There was no express allegation of probation ineligibility. Nevertheless, the prosecutor pled a fourth alleged prior for second degree burglary without appending an enhancement allegation. Presumably his purpose in including that allegation was to establish probation ineligibility in the event he failed to obtain a verdict that independently rendered defendant ineligible for probation.

Since there was no objection at trial to the proof of the grand theft prior, there was no opportunity for the prosecutor to explain his purpose in going forward with that proof. Had defense counsel objected, the prosecutor would have had an opportunity to clarify his theory of admissibility. He might also have been granted leave to amend the information to expressly allege probation ineligibility as a consequence of the grand theft prior. (§ 969a.) It is not necessary for the prosecutor to plead and prove prior convictions for purposes of probation ineligibility under section 1203, subdivision (e)(4) (*People v. Dorsch* (1992) 3 Cal.App.4th 1346, 1349-1350), but we see nothing prohibiting such a course if the prosecutor so elects.[10] (Cf. *In re Varnell* (2003) 30 Cal.4th 1132, 1140-1141 [where statute absolutely prohibits probation based on prior convictions, priors must be pleaded and proved, but where it allows probation in "unusual cases" pleading and proof is not necessary].) While proceeding with proof of the second prior conviction to establish probation ineligibility might be considered overkill after obtaining a murder conviction with a firearm discharge enhancement (§§ 1203, subd. (e)(5), 12022.53, subd. (g)), we see nothing prohibiting the prosecutor from doing so.

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[10] Based on our review of the probation ineligibility statutes, we find none, and the Attorney General has cited none, which would have expressly required pleading and proof of the prior conviction for grand theft.

Since no petition for writ of habeas corpus has been filed, as is usually required for claims of ineffective assistance of counsel (*People v. Snow* (2003) 30 Cal.4th 43, 111), we have no insight into why defense counsel failed to object to the introduction of Exhibit 19. Perhaps, knowing the grand theft prior would be used at sentencing in any case, she believed she had a better chance of reducing the utility of that conviction at sentencing if proof of the prior were presented to the jury subject to the beyond a reasonable doubt standard of proof, rather than allowing the judge to use it at sentencing without such proof. She might also have considered the potential prejudicial effect of Exhibit 19 to be negligible or nonexistent, as do we.

In any case, we need not decide whether defense counsel's performance was deficient because we conclude that defendant has failed to establish the second prong of *Strickland v. Washington*, *supra*, 466 U.S. at page 694, namely that in the absence of the error it is reasonably probable that a result more favorable to him would have obtained. It is appropriate for us to address the second prong first in these circumstances, without addressing the performance prong. "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies . . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Id.* at p. 697.)

C. <u>There Was No Prejudice</u>

The trial court did not impose an enhanced sentence on the basis of the prior grand theft conviction. Hence, there was no direct prejudice as a result of the admission of the evidence of that conviction, despite the jury's true finding. The abstract of judgment does not even reflect a finding on the grand theft prior. Nevertheless, defendant argues that he was prejudiced by the evidence of the grand theft prior because it may have influenced the jury's true findings on the other prior conviction allegations. We disagree.

The documentary evidence supporting the jury's true finding on the 1994 firearm assault included the information, plea waiver form, change of plea transcript, sentencing transcript, and the abstract of judgment. Defendant's guilty plea and admission of personal use of a firearm are fully documented in Exhibit 18. We are confident the true finding on this prior conviction was not influenced by evidence of the 1987 grand theft conviction.

With respect to the true finding on the prior robbery conviction, we also find no reasonable probability that the jury was influenced by the evidence of the grand theft prior. The proof of this prior included the complaint, change of plea transcript, and abstract of judgment. In addition, a section 969b packet was admitted, which included a fingerprint card and photograph of the defendant from that conviction, and prison records showing he served a prison term for that offense. Finally, at the change of plea hearing on the 1994 assault, defendant expressly admitted the prior robbery conviction.

Defendant argues that the jury might have found the robbery prior "too remote in time to warrant a verdict of true." But the jury was not authorized to reject a true finding on the basis of remoteness, as there is no washout period under the three strikes law or section 667, subdivision (a)(1).

Defendant also urges that, in the absence of the evidence of the grand theft prior, the jury might have found the robbery prior untrue because it was proved using documents only, whereas there had been live testimony regarding the assault prior at the trial on the murder charge. He also suggests the jury might have found the documentary evidence "too thin." On the contrary, all of the prior convictions in the bifurcated proceeding were proven by documentary evidence, and the jury was instructed that it must not consider the evidence in the murder trial in determining the truth of the prior convictions. There is no reason to believe the jury misunderstood that documentary proof was not only sufficient to perform its limited role in the determination of prior convictions, but that it was restricted to consideration of the documentary proof in

making its true findings. The documentation of the priors was straightforward, and the jury deliberated for less than an hour before finding all three priors true.

Defendant further argues that the jury might not have considered him to be "the kind of person who stole" based on the robbery conviction alone, if it had not seen evidence of another theft-related offense. He claims that the proof of the 1987 grand theft told the jury that he had gone to state prison for the grand theft charge, that he was "a bad enough person to be held without bail," and that he had two more prior convictions besides the grand theft, namely the 1982 burglary originally alleged as the fourth prior conviction and an attempted burglary in 1980 for which he had been sentenced to the California Youth Authority.

Defendant overstates the case. Defendant was not held without bail in connection with the 1987 grand theft; rather, bail was set at $15,000. Moreover, even if Exhibit 19 had been excluded from evidence, the jury would have learned from Exhibits 18 and 21 of the grand theft prior and of defendant's incarceration. In addition, the jury also learned through Exhibits 18 and 20 that defendant had allegedly sustained a conviction in 1982 for burglary. The only additional prior conviction mentioned in Exhibit 19 was the 1980 attempted burglary, while defendant was a juvenile.

Moreover, the gist of robbery is not simply the intent to steal, but the use of force or fear in accomplishing that end. (CALCRIM No. 1600.) There was no evidence of defendant's good character for honesty that would have convinced the jury that he was "not the kind of person who stole." It is highly unlikely that the jury would have been influenced by a grand theft prior or any other information conveyed by Exhibit 19 to make a true finding on the robbery prior if it otherwise had been inclined to find the robbery prior untrue.

Defendant also complains that the jury instructions "did not tell the jury not to consider evidence of some of the alleged priors in deciding whether [defendant] had been convicted of other of those priors." The trial court did instruct the jury that it must

"consider each of the alleged prior convictions separately," as well as reciting, "Each count charges a distinct allegation. You must decide each count separately. . . ." These instructions adequately cautioned the jury against any bleed-over effect from the evidence of one prior to another.

In light of the strong independent proof of the other two prior convictions and the foregoing instructions, we find no reasonable likelihood that any error in counsel's failure to object to admission of Exhibit 19 was in any way prejudicial to the outcome of the trial on the first and third prior conviction allegations. We thus decline to find that the defendant was deprived of the effective assistance of counsel in the bifurcated trial. Indeed, even if we reached the merits of whether the evidence of the grand theft prior was properly admitted and found it was not, we still would find that it was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

DISPOSITION

The judgment is affirmed, and the request for a new trial on the prior conviction allegations is denied.

_____
Richman, J.

We concur:

_____
Haerle, Acting P.J.

_____
Lambden, J.